Kamalanathan a/l Erulandi Pandaram v Rackayee Letchumi a/p E Pandaram

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-198–04 OF 2014
AKHTAR TAHIR JC
16 FEBRUARY 2016

Probate and Administration — Administration — Administration action — Wills — Claim for property by deceased's children — Plaintiff alleged paying monthly instalments of housing loan occupied by mother — Half share of property held by deceased transferred to defendant as executor of will — Whether half shares of property held under name of deceased held in trust for plaintiff — Whether will null and void and of no effect — Whether defendant entitled to half shares of plaintiff in property

The plaintiff and the defendant were the children of one Madam Krisnamal ('the late mother'). By a sale and purchase agreement ('the SPA'), the plaintiff and the late mother had purchased a double storey terrace house ('the property') for a total purchase price of RM115,000 in which the plaintiff alleged that he had paid a sum of RM11,500 as deposit. The defendant contended that the said deposit was instead paid by the late mother. The plaintiff and the late mother further obtained a housing loan in the sum of RM60,000 and all monthly instalments as repayment of the loan was paid by the plaintiff. According to the plaintiff, the said loan was defaulted and a sum of RM15,000 as full and final settlement was paid by the late mother by means of pledging her jewellery. However, the defendant alleged that subsequent to the default, a foreclosure proceeding was commenced by the bank to auction the property and it was the defendant who paid the balance housing loan in the total sum of RM67,000. The plaintiff came to know from the bank that half share of the property held by the late mother had been transferred to the defendant as executor of a will and subsequently as the owner. As a result of that, the plaintiff was further issued with a copy of a will purportedly executed by the late mother, in which the plaintiff at all time averred that the said will was null and void as the late mother has no legal right to will half share's of the said property to the defendant as she was merely holding the same in trust for the benefit of the plaintiff. Therefore, the plaintiff claimed for a declaration that the half shares of the property held under the name of the late mother was held in trust for the plaintiff; the will was null and void and of no effect. The defendant filed a counterclaim seeking that the defendant was entitled to half the shares of the plaintiff in the property and that the property was merely hold on trust by the plaintiff on behalf of the defendant and a further order that the

plaintiff be compelled to sign the transfer form to that effect together with general damages.

Held:

(1) Based on the land grant alone, putting aside evidence of who paid the deposit payments, monthly instalments or the payment for the settlement on the purchase of the property based on s 340 of the National Land Code the late mother had an indefeasible title for half the share of the house. There was no issue of fraud or forgery raised by the plaintiff to defeat the half share of the late mother. Having an indefeasible title to the half of the share of the land the late mother had a right to transfer her half share. The late mother did transfer her half share to the defendant (see paras 21–22).

(2) The property was thus owned by both the plaintiff and the defendant in equal shares. Nonetheless, since it was not a disputed fact that the defendant had been occupying the property since 1992 until present, the plaintiff had been deprived of his right to the useful enjoyment of his half shares of the property. To compensate the plaintiff for this loss, the defendant was ordered to pay a sum of RM1,000 as a rental for staying in the house from the date of filing of this writ until the date of this order by the court. This order on rental, although not specifically pleaded by the plaintiff, was directed to be paid as a further relief as justice may require (see para 28).

[Bahasa Malaysia summary

Plaintif dan defendan adalah anak-anak kepada Puan Krisnamal ('mendiang ibu'). Dengan perjanjian jual beli ('PJB'), plaintif dan mendiang ibu telah menjual rumah teres dua tingkat ('hartanah') bagi harga belian keseluruhannya sebanyak RM115,000 yang mana plaintif mendakwa dia telah membayar sejumlah RM11,500 sebagai deposit. Defendan berhujah bahawa deposit sebenarnya dibayar oleh mendiang ibu. Plaintif dan mendiang ibu selanjutnya mendapat pinjaman perumahan dalam jumlah RM60,000 dan kesemua ansuran bulanan sebagai pembayaran balik pinjaman dibayar oleh plaintif. Mengikut plaintif, pinjaman diingkari dan sejumlah RM15,000 dibayar oleh mendiang ibu sebagai penyelesaian penuh dan muktamad dengan melalui memberikan jaminan barang kemasnya. Walau bagaimanapun, defendan mendakwa bahawa selepas, prosiding perampasan dimulakan oleh bank untuk melelong hartanah dan adalah defendan yang membayar baki pinjaman rumah dalam jumlah keseluruhan sebanyak RM67,000. Plaintif hanya mengetahui daripada bank bahawa sebahagian syer hartanah tersebut dipegang oleh mendiang ibu telah dipindahkan kepada defendan sebagai wasi wasiat dan kemudiannya sebagai pemilik. Akibatnya, plaintif selanjutnya mengeluarkan salinan wasiat yang didakwa dilaksanakan oleh mendiang ibu, yang mana plaintif pada kesemua masa berhujah bahawa wasiat tersebut adalah tak sah

dan batal kerana mendiang ibu tidak mempunyai hak undang-undang kepada sebahagian syer hartanah tersebut kepada defendan kerana ia memegangnya dalam amanah bagi kepentingan plaintif. Oleh itu, plaintif menuntut untuk perisytiharan bahawa sebahagian syer hartanah tersebut yang dipegang di bawah nama mendiang ibu dipegang dalam amanah untuk plaintif; wasiat adalah batal dan tak sah dan tidak berkesan. Defendan memfailkan tuntutan balas memohon bahawa defendan berhak kepada sebahagian syer plaintif dalam hartanah dan bahawa hartanah tersebut hanya dipegang atas amanah oleh plaintif bagi pihak defendan dan perintah selanjutnya bahawa plaintif dipaksa untuk menandatangani borang pindah bersama dengan ganti rugi am.

Diputuskan:

(1) Berdasarkan atas geran tanah itu sendiri, meletakkan sebelah keterangan mengenai siapa yang membayar bayaran deposit, ansuran bulanan atau bayaran bagi penyelesaian atas pembelian hartanah berdasarkan s 340 Kanun Tanah Negara mendiang ibu mempunyai hakmilik tak boleh sangkal bagi sebahagian syer rumah tersebut. Tidak terdapat isu fraud atau pemalsuan dibangkitkan oleh plaintif untuk mematahkan sebahagian saham mendiang ibu. Dengan mempunyai hakmilik tak boleh sangkal kepada sebahagian syer hartanah tersebut mendiang ibu mempunyai hak untuk memindahkan sebahagian syernya. Mendiang ibu telah memindahkan sebahagian syernya kepada defendan (lihat perenggan 21–22).

(2) Hartanah oleh itu dimiliki oleh kedua-dua plaintif dan defendan dalam syer yang sama. Walau bagaimanapun, memandangkan ia bukan fakta yang dipertikaikan bahawa defendan telah menghuni hartanah tersebut semenjak 1992 sehingga sekarang, plaintif telah dinafikan haknya kepada keseronokan berguna sebahagian syernya terhadap hartanah tersebut. Untuk mempampaskan plaintif bagi kerugian ini, defendan diperintahkan untuk membayar jumlah sebanyak RM1,000 sebagai sewa bagi tinggal dalam rumah tersebut dari tarikh pemfailan writ ini sehingga tarikh perintah oleh mahkamah ini. Perintah ini ke atas sewaan, walaupun tidak diplidkan secara spesifik oleh plaintif, diarahkan untuk dibayar sebagai relief seterusnya kerana keadilan mengkehendakinya (lihat perenggan 28).]

Notes

For cases on administration action, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 1819–1833.

Cases referred to

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173, FC (refd) A

Legislation referred to

National Land Code s 340
Wills Act 1959 ss 3, 5 B

Gurdip Singh (Chrysandy Lai with him) (AS Dhaliwal) for the appellant.
Kalai (Kalai & Partners) for the respondent.

Akhtar Tahir JC: C

FACTS OF THE CASE

[1] The plaintiff and the defendant in these proceedings ('the parties') before me are the children of one Madam Krisnamal d/o Palaniandy ('the late mother'). D

[2] By a sale and purchase agreement dated 19 June 1992, the plaintiff and the late mother had purchased a double storey terrace house held under HS(D) 134062, PT No 23907, Bandar Petaling Jaya Selatan, Daerah Petaling, Selangor ('the property') for a total purchase price of RM115,000, in which the plaintiff alleged that he had paid a sum of RM11,500 as deposit. The defendant on the other hand contended that the said deposit as alleged by the plaintiff was instead paid by the late mother through cash payment and cheque. E F

[3] The plaintiff further alleged that at the date of execution of the said sale and purchase agreement, the late mother was of 54 years old, unemployed and was living with the plaintiff. Meanwhile the defendant in denying the plaintiff's fact avers that the late mother was self employed in the business of selling fish in a market and had received a lucrative income. G

[4] The plaintiff and the late mother further had obtained a housing loan in the sum of RM60,000 and all monthly instalments as repayment of the loan was paid by the plaintiff. The defendant agreed to the facts that there is a loan agreement signed to the total sum of RM60,000 by the plaintiff and the late mother but denies all monthly instalment paid by the plaintiff. In fact, the defendant is of the stand that at all material times it was the late mother who had made all the monthly instalment on the repayment of the loan until she finally passed away on 21 March 2006 which thereafter the defendant had taken the responsibility to continue paying. H I

[5] According to the plaintiff, sometimes in March 2012, the said loan was defaulted and a sum of RM15,000 as full and final settlement was paid by the

late mother by means of pledging her jewellery. The facts admitted by the defendant were only with regards to the default of the loan. The defendant further alleged that subsequent to the default, a foreclosure proceeding was commenced by the bank to auction the property and it was the defendant who had paid the balance housing loan in the total sum of RM67,000.

[6] Sometimes in November 2013, the plaintiff had came to know from the bank that half share of the property held by the late mother had been transferred to the defendant as executor of a will and subsequently as the owner.

[7] As a result of that, the plaintiff was further issued with a copy of a will purportedly executed by the late mother on 3 January 2006, in which the plaintiff at all time avers that the said will was null and void as the late mother has no legal right to will half share's of the said property to the defendant as she was merely holding the same in trust for the benefit of the plaintiff.

[8] There was also no dispute to the fact that the defendant has been occupying the property from 1992 until present.

[9] The defendant on the other hand contended that the will is valid and legally made as the late mother had signed the will when she was legally capable, with full knowledge of the content of the will and at all material time was of sound mind. It was further the intention of the late mother in giving her half shares in the said property to the defendant as has been reflected in the will.

[10] The defendant further avers that the plaintiff is the one who has no legal rights or even beneficial interest over the property as he has made no payments towards the purchase price and the housing loan sums.

[11] Therefore the plaintiff's claim as a whole, apart from a declaration that the half shares of the double storey terrace house held under the name of the late mother was held in trust for the plaintiff, that the will dated 31 January 2006 is null and void and of no effect and further a declaration that the registration of the defendant's name as having half share's on the property was also void and of no effect.

[12] The plaintiff further seek that the registrar of the land office to cancel the registration of the defendant's half shares on the property and instead to register the same under the name of the plaintiff and an order for vacant possession together with general damages.

[13] The defendant had also filed a counterclaim seeking that the defendant is entitled to half the shares of the plaintiff in the property and that the property

was merely hold on trust by the plaintiff on behalf of the defendant and a further order that the plaintiff be compelled to sign the transfer form to that effect together with general damages.

[14] In condensing the above facts elicited from the claim and counter claim it could be summarised that both the plaintiff and the defendant claimed full right over the said house to the exclusion of the other.

FINDINGS OF THE COURT

[15] The history of the family showed that the late mother of the parties here was widowed at an early age and was therefore left to fend herself and her children. The late mother opened a fish stall at the market of PJ Old Town. The elder siblings of the plaintiff and the defendant assisted in running the fish stall on a regular and full time basis but slowly moved to helping part time.

[16] The more important fact however was, that at the time the house was bought the plaintiff was running on full time basis the business at the fish stall together with the mother. The other siblings were only helping on a part time basis. This fact was borne out by the elder sister ('SD3') of the parties who testified on behalf of the defendant.

[17] Based on the fact that the plaintiff was running the full time business of the fish stall together with the mother it was reasonable to infer that any decision on using the income derived from the business would have to be made jointly between the plaintiff and the late mother. It is my firm finding of fact that the decision to buy the house was joint decision between the plaintiff and the late mother.

[18] Besides being a joint decision to buy the house, evidence led showed that both the plaintiff held equal share to the house. This is clear from the land grant produced and marked as P2. In P2 the late mother was clearly endorsed as a half share owner of the land. This traverses the plaintiff's contention that the late mother held the half share as a trust for him. If this was so there should have been endorsement on the land grant to that effect.

[19] Section 340 of the National Land Code highlights the rights of a registered owner of the land as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances.

A

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

B

(2) The title or interest of any such person or body shall not be indefeasible –

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

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(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) –

D

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

E

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

F

(4) Nothing in this section shall prejudice or prevent –

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

G

(b) the determination of any title or interest by operation of law.

[20] This provision is further supported by the Federal Court decision in the case of *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173 in which per Arifin Zakaria CJ delivering the judgment of the court has held as follows:

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(1) Section 340 of the NLC introduced the concept of indefeasibility of title following the Torrens system wherein, s 340(1) sets out the general principle that the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. However, the indefeasibility of title or interest so acquired under s 340(1) is liable to be set aside under s 340(2) where it has been obtained by, inter alia, fraud or forgery. Thus, the title is subject to challenge and can be defeated although the proprietor or transferee acted in good faith in acquiring the title or interest (paras 26 & 27).

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[21] As such, based on the land grant alone putting aside evidence of who has paid the deposit payments, monthly instalments or the payment for the settlement on the purchase of the property based on s 340 of the National Land Code the late mother has an indefeasible title for half the share of the house. There was no issue of fraud or forgery raised by the plaintiff to defeat the half share of the late mother.

[22] Having an indefeasible title to the half of the share of the land the late mother had a right to transfer her half share. The late mother did transfer her half share to the defendant which is clear from the will which was read out to the family members by SD2 on the 16th day of prayers after the late mother's death.

[23] Although issues were raised by the plaintiff of the sudden appearance of SD2 on the 16th day prayers and allegation that he was not really close to the late mother, I chose to believe the testimony of SD2 that in fact he was a close friend of the late mother knowing her for nearly 35 years. I further accepted the testimony of SD2 that the will was validly made by the late mother and there was no element of undue influence or coercion. I also accepted the evidence of SD2 that the late mother of sound mind and had communicated her wish to transfer her half of the share of the house to the defendant. I also believed the testimony of SD2 that it was the wish of the late mother that the will be only read out on the 16th day prayers held for her after her death.

[24] My decision on the validity of the will is further supported by the provisions of the Wills Act 1959, specifically ss 3 and 5, in which spells out that:

> 3 Property disposable by will
>
> Except as hereinafter provided, *every person of sound mind* may devise, bequeath or dispose of by his will, executed in manner hereinafter required, *all property which he owns or to which he is entitled either at law or in equity* at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will.
>
> 5 Mode of execution
>
> (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
>
> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:
>
> Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following,

A or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance –

B (a) that the signature shall not follow or be immediately after the foot or end of the will;

(b) that a blank space shall intervene between the concluding word of the will and the signature;

C (c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses;

D (d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or

(e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,

E and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

F (Emphasis added.)

[25] In other words according to s 5, a will is held valid if:

G (a) the testator's signature to the will is made in the presence of two or more witnesses present at the sometime; or

(b) if the signature is acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time.

H **[26]** Again, even though the validity of the will was questioned by the plaintiff, both the above provisions of the Wills Act were never invoked by the plaintiff.

[27] Gopal Sri Ram in the Court of Appeal case of *Lee Ing Chin @ Lee Teck* I *Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 has this to say on the points of validity of a will:

Where the validity of a will was challenged, the burden of proving testamentary capacity and due execution is on the propounder of the will as is the burden of dispelling any suspicious circumstances that may surround the making of the will.

That burden may be discharged by showing that the testator, being of competent mind, had his will read over to him or that the testator knew and approved of the contents of the will. *The onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay on those who challenged the will, in this case, the plaintiffs.* (Emphasis added.)

DECISION OF THE COURT

[28] Therefore as a result of the above findings and after careful consideration of all the evidence before me, it is my decision that the property is thus owned by both the plaintiff and the defendant in equal shares. Nonetheless, since it is not a disputed fact that the defendant has been occupying the property since 1992 until present the plaintiff has been deprived of his right to the useful enjoyment of his half shares of the property. To compensate the plaintiff for this loss I directed that the defendant to pay a sum of RM1,000 as a rental for staying in the house from the date of filing of this writ until the date of this order by the court. This order on rental, although not specifically pleaded by the plaintiff, was directed to be paid as a further relief as justice may require.

[29] Finally I directed both parties to bear their own cost.

Order accordingly.

Reported by Afiq Mohamad